Rafiah bte Bakar v East West-UMI Insurance Bhd

HIGH COURT (JOHORE BAHRU) — CIVIL SUIT NO 22-262 OF 1990
JAMES FOONG J
25 AUGUST 1992

Insurance *— Subrogation — Set-off and counterclaim of insured claimed by insurers against third party — Whether insurers can bring claims against third party — No formal assignment of insured's right of action to insurers*

Insurance *— Liability to third party — Third party obtaining judgment against insured — Whether insurers under a liability to pay the third party who is entitled to the benefit of judgment obtained against an insured person — Exception to law of privity of contract*

Insurance *— Claim against a third party — Road accident — Claim by insurers against third party as indemnity for part of damages award — Road Transport Act 1987 s 96*

Road Traffic *— Negligence — Liability of insurers to third party for insured's judgment debt — Plaintiff's claim against insurers for negligence of insured — Plaintiff a third party — Judgment obtained against insured in respect of motor accident — Whether insurers were liable to plaintiff for judgment debt — Whether statutory provision is an exception to the law of privity of contract — Road Transport Act 1987 s 96*

The plaintiff's son was riding a motor cycle with Sulaiman Aziz ('Sulaiman') as the pillion passenger when the motor cycle collided with a bus driven by Abdul Razak ('Razak'). The bus was owned by South Johore Omnibus Co Sdn Bhd ('SJO') and the insurers were the defendant company. The plaintiff's son was killed in the accident. The plaintiff sued Razak and SJO ('the first suit') while Sulaiman sued SJO ('the second suit'). In the second suit, SJO brought in the deceased's estate as a third party.

The High Court decided in the first suit that Razak and SJO were liable in damages to the extent of 70%, while 30% of the liability was attributed to the deceased. In the second suit, it was decided that SJO and the deceased were liable in damages to Sulaiman to the extent of 70% and 30% respectively. The High Court also ordered in the second suit that SJO pay Sulaiman 100% of the damages and be indemnified by the deceased's estate to the extent of 30% of the damages. The defendant company, as insurers, had paid Sulaiman 100% of the damages awarded in the second suit. The plaintiff claimed from the defendant company for, inter alia, the sum of $15,317.56 which was the liability of Razak and SJO in the first suit to the extent of 70%. The defendant company sought a set-off and counterclaim for 30% of the amount of damages paid to Sulaiman in respect of the second suit.

Held, allowing the claim and dismissing the set-off and counterclaim:

(1) Under s 96 of the Road Transport Act 1987 ('the Act'), the insurers are under a liability to pay a third party who is entitled to the benefit of judgment obtained against an insured person. This

statutory provision is an exception to the law of privity of contract and allows recovery of money by a person who is not a party to the contract. Accordingly, whether the plaintiff had obtained judgment as a dependant or as an administratrix of the deceased's estate, the defendant company was liable to pay to the plaintiff the sum of $15,317.56.

(2) Section 96 of the Act does not, however, provide a right to the insurers to claim from the third party. The defendant company therefore could not set-off or counterclaim against the plaintiff under s 96 of the Act for the 30% of the damages paid to Sulaiman.

(3) Subrogation is not an automatic process given to insurers by the insured so as to place the insurers in a position where the insurers are entitled to all the rights and remedies which the insured has against a third party. There must be a formal assignment of the right of action and the insurers cannot, in the absence of such a formal assignment, bring an action against the third party in their own names.

(4) In this case, the defendant company, by claiming a set-off and counterclaim, was making a claim in its own name. In the absence of any evidence of a formal assignment for subrogation, the defendant company's claim for a set-off and counterclaim was dismissed.

[Bahasa Malaysia summary

Anak lelaki plaintif sedang menunggang motosikal bersama Sulaiman Aziz ('Sulaiman') sebagai pembonceng apabila motosikal itu berlanggar dengan sebuah bas yang dipandu oleh Abdul Razak ('Razak'). Bas itu dimiliki oleh South Johore Omnibus Co Sdn Bhd ('SJO') dan syarikat insurans adalah syarikat defendan. Anak lelaki plaintif telah terkorban dalam kemalangan itu. Plaintif telah mendakwa Razak dan SJO ('guaman pertama itu') sementara Sulaiman mendakwa SJO ('guaman kedua itu'). Dalam guaman kedua itu, SJO membawa masuk harta pusaka si mati sebagai pihak ketiga.

Mahkamah Tinggi memutuskan dalam guaman pertama itu bahawa Razak dan SJO bertanggungan membayar ganti rugi pada setakat 70%, sementara 30% liabiliti itu dianggap disebabkan oleh si mati. Dalam guaman kedua itu, telah diputuskan bahawa SJO dan si mati bertanggungan membayar ganti rugi kepada Sulaiman pada setakat 70% dan 30% masing-masing. Mahkamah Tinggi juga memerintahkan dalam guaman kedua itu bahawa SJO membayar Sulaiman 100% ganti rugi dan harta pusaka si mati menanggung ruginya pada setakat 30% ganti rugi itu. Syarikat defendan, sebagai syarikat insurans, telah membayar Sulaiman 100% ganti rugi yang diawardkan dalam guaman kedua itu. Plaintiff menuntut daripada syarikat defendan, antara lain, jumlah $15,317.56 yang menjadi liabiliti Razak dan SJO dalam guaman pertama itu pada setakat 70%. Syarikat defendan meminta tolakan dan tuntutan balas bagi 30% amaun ganti rugi yang telah dibayar kepada Sulaiman berkenaan dengan guaman kedua itu.

Diputuskan, membenarkan tuntutan itu dan menolak tolakan dan tuntutan balas itu:

(1) Di bawah s 96 Akta Pengangkutan Jalan 1987 ('Akta itu'), syarikat insurans adalah di bawah suatu liabiliti untuk membayar suatu pihak ketiga yang berhak kepada faedah penghakiman yang diperoleh terhadap pengambil insurans. Peruntukan statutori ini adalah suatu kekecualian undang-undang priviti kontrak dan membenarkan seseorang itu yang bukan pihak dalam kontrak mendapatkan bayaran wang. Oleh itu, sama ada plaintif telah memperoleh penghakiman sebagai seorang tanggungan atau sebagai pentadbir harta pusaka si mati, syarikat defendan bertanggungan membayar kepada plaintif jumlah $15,317.56.

(2) Seksyen 96 Akta itu tidak, akan tetapi, memperuntukkan suatu hak kepada syarikat insurans untuk menuntut daripada pihak ketiga. Syarikat defendan dengan itu tidak boleh mendapat tolakan atau menuntut balas terhadap plaintif di bawah s 96 Akta itu bagi 30% ganti rugi yang dibayar kepada Sulaiman.

(3) Subrogasi bukanlah suatu proses automatik yang diberi kepada syarikat insurans oleh pengambil insurans supaya meletakkan syarikat insurans dalam kedudukan di mana syarikat insurans berhak kepada semua hak-hak dan remedi-remedi yang pengambil insurans ada terhadap pihak ketiga. Seharusnya terdapat suatu penyerahhakkan formal hak tindakan dan syarikat insurans tidak boleh, dalam ketiadaan penyerahhakkan formal sedemikian, membawa suatu tindakan terhadap pihak ketiga dalam nama mereka sendiri.

(4) Dalam kes ini, syarikat defendan, dengan menuntut tolakan dan tuntutan balas, telah membuat tuntutan dalam namanya sendiri. Dalam ketiadaan sebarang keterangan tentang penyerahhakkan formal untuk subrogasi, tuntutan syarikat defendan untuk suatu tolakan dan tuntutan balas ditolak.]

Cases referred to

1 *Neo Seo Thun v Ng Peng Hui* [1975] 2 MLJ 56 (refd)

2 *London Assurance Co v Sainsbury* (1783) 3 Dougl 245; 99 ER 636 (folld)

Legislation referred to

Civil Law Act 1956 s 7

Road Transport Act 1987 ss 91(4), 96

N Jegatheeson (*John Ang & Jega*) for the plaintiff.

Ang Boon Heng (*HH Long & Co*) for the defendants.

James Foong J: This is an application by way of a notice of motion by the plaintiff for:

(a) a declaration that by a judgment order dated 16 November 1989 for the sum of $15,317.56 with interest thereon was given in favour of the plaintiff as dependent of one Khalid bin Salleh (deceased);

(b) that the defendants do pay the plaintiff the sum of $15,317.56 with interest thereon; and
(c) a declaration that the counterclaim of the defendants dated 3 January 1991 is wrong in law and be dismissed with costs.

This application arose out of a writ of summons filed by the plaintiff against the defendants claiming a judgment sum of $15,317.56 together with interest. The judgment sum is derived from a court order granted by Mr Justice Dato' Abu Mansor dated 16 November 1989 in the Johore Bahru court in Civil Suit No 25–1679–86 where he awarded 70% liability against one Abdul Razak and South Johore Omnibus Co Sdn Bhd ('the insured'), as a result of a road accident involving a motor cycle ridden by the plaintiff's son ('the deceased') with a pillion rider by the name of Sulaiman bin Aziz ('Sulaiman') and the insured motor bus. As a result of this motor accident, the plaintiff's son was killed. The balance of the 30% was attributed to the deceased.

This 70% amounts to a sum of $15,317.56. The plaintiff is now seeking to enforce this judgment sum on the defendants as insurers of the insured motor bus at the material time under s 96 of the Road Transport Act 1987 ('the Act').

The defendants on the other hand, contended that they have a set-off against the plaintiff's claim up to a sum of 30% of $91,843.12. This arose from a separate civil suit hearing — High Court Johor Bahru Civil Suit No 25–1110–86 filed by Sulaiman, the pillion rider of the motor cycle against the insured. The insured in this case, brought in the deceased's estate as a third party. This civil suit was consolidated with Civil Suit No 25–1679–86.

Mr Justice Dato' Abu Mansor's judgment order dated 16 November 1989 in respect of Civil Suit No 25–1679–86 (which is also in the same judgment order in respect of case no 25–1110-86) ordered, inter alia, that:

(i) the insured and the deceased be 70% and 30% liable to Sulaiman; and
(ii) the insured do pay to Sulaiman the 100% of the damages while entitled to be indemnified by the deceased estate up to the extent of 30% of the sum awarded.

The defendants as insurers of the insured have already paid out to Sulaiman 100% of the award. When the plaintiff filed this claim, the defendants sought a set-off and counterclaim for the 30% from the amount they had paid off to Sulaiman.

The plaintiff contends that such a set-off and counterclaim are not permissible under s 91 of the Act. Further, she alleged that the award given was granted on a dependency claim under s 7 of the Civil Law Act 1956. The judgment order dated 16 November 1989 for 30% indemnity was against the estate of the deceased. As a dependent is different from that of the estate of the deceased, this claim of 30% by way of set-off and counterclaim cannot succeed.

The defendants however argued that when the plaintiff made her claim against the insured in respect of the deceased, it was made both as dependent and as administratrix for the estate of the deceased. Therefore, even at

p 3 of the judgment order dated 16 December 1989, the words used to describe the plaintiff were 'the dependent of the deceased and administratrix of the estate' of the deceased. In view of such circumstances, all awards to the plaintiff should be merged and taken as payment to the estate of the deceased following the principle laid down in *Neo Seo Thun v Ng Peng Hui*.[1]

The plaintiff replied to state that she had abandoned the estate claim during the trial of the deceased's claim against the insured but unfortunately, the defendants denied such an allegation and there are no acceptable and proper records tendered to this court as evidence of this matter.

After careful consideration, I shall proceed to deal with prayer two and three of this application before reverting back to the first prayer in this application.

Prayer two of this application is for an order that the defendants pay to the plaintiff a sum of $15,317.56 with interest and costs. This application is made in pursuance to s 96 of the Act where the insurers are under a liability by way of statute, to pay a third party who is entitled to the benefit of a judgment obtained against an insured person who has a valid insurance policy, as defined under s 91(4) of the Act, with the insurers. This statutory provision provides an exemption to the law of privity in contract. It allows recovery of money by a third person who is not a party to the contract. By the use of the words 'the insurer shall', statute has imposed a mandatory duty upon the insurers concerned to pay to the person entitled to the benefits of the judgment any sum payable thereupon. Therefore, whether the plaintiff in this case has a judgment order obtained as a dependent or as an administratrix of the deceased estate, the defendants as insurers are liable to pay to the plaintiff the judgment sum. Therefore, under these circumstances, I allow prayer one of this application.

As regards the third prayer of the plaintiff to strike out the defendants' claim for a set-off and counterclaim, the issue is whether such a set-off and counterclaim can be entertained where the plaintiff's claim is proceeded under s 96 of the Act. After due consideration, I find that the defendants' set-off and counterclaim cannot be sustained in a claim under s 96 of the Act. The plaintiff's claim under s 96 of the Act is an entitlement provided for under statute and it is mandatory upon the defendants as insurers to pay a judgment order so obtained. As stated earlier, this right is an exception to the rule on privity and allows the plaintiff to proceed directly against the insurers. However the statute does not provide such a right to the insurers to claim from the plaintiff. This right only flows one way and that is only in favour of the plaintiff in this case. Such being the case, the defendants cannot make a set-off and counterclaim against the plaintiff. Even the defendants' claim against the plaintiff is one that is against the estate of the deceased and not as a dependent.

Still on the subject matter of the defendants' right to a set-off and counterclaim against the plaintiff, I find that the defendants are making such claims as insurers for their insured. The judgment order only directed that the insured be indemnified up to 30% of the sum of $91,843.12 from the deceased's estate. It never accords the insurers such a right to indemnity. The defendants as insurers can only possess such a right if there has been a subrogation. However, from the affidavits so filed by the defendants

there are no evidence of any subrogation of his rights by the insured to the defendants.

Subrogation is not an automatic process given to an insurer by his insured so as to be placed in a position to be entitled to the advantages of all rights and remedies which the insured has against the third party in respect of the subject matter. There must be a formal assignment of the right of action and an insurer cannot, in the absence of such a formal assignment, bring an action against a third party in their own names. See the case of *London Assurance Co v Sainsbury*.[2]

However in this case, the defendants by claiming the set-off and counter-claim in an action brought against them as insurers are making a claim in their own name. In the absence of any evidence of a formal assignment for subrogation, such claim cannot be entertained and should be dismissed.

In view of the reasons I have stated aforesaid, I allow the plaintiff's third prayer in this application.

Now, returning to the plaintiff's first prayer in this application, I find that there is no necessity for this court to grant such a declaration. This prayer has no relevance to this civil suit in view of the aforesaid orders being granted. I shall therefore make no orders thereto.

Prayers two and three of this application (encl 18) are hereby allowed with costs to the plaintiff.

Claim allowed and set-off and counterclaim dismissed.

Reported by Wong Kian Kheong